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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re SAMUEL B., a Person Coming Under  
the Juvenile Court Law.

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LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN &  
FAMILY SERVICES,

Plaintiff and Respondent,

vs.

SAMUEL P.,

Defendant and Appellant.

B177340

(Los Angeles County  
Super. Ct. No. CK47785)

APPEAL from the judgment of the Superior Court of Los Angeles County,  
Anthony Trendacosta, Referee. Judgment is affirmed.

John L. Dodd & Associates, Lisa A. DiGrazia for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel  
and Pamela Landeros, Deputy Counsel for Plaintiff and Respondent.

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Samuel B. was declared dependent based on his parents' drug use. His mother was repeatedly terminated from drug treatment programs and failed to reunify with Samuel. His father, Samuel P. ("father") attempted reunification. During the second six-month period of reunification services, father was convicted of robbery and commenced serving a lengthy prison term. The Los Angeles County Department of Children and Family Services ("Department") conceded that father had complied with his case plan as well as he could while in prison, but the dependency court terminated father's reunification services because there was no reasonable possibility Samuel could be returned to father's custody within the statutory time limit. The dependency court set the case for a hearing under Welfare & Institutions Code<sup>1</sup> section 366.26. Father, who was acting in propria persona, did not seek writ review of this decision.

Father had also requested the dependency court to order the county jail to grant him pro per privileges. The dependency court denied the motion, believing it had no authority over the county jail. Father did not timely appeal.

At the section 366.26 hearing, father argued against termination of his parental rights. He attempted to argue that the paternal aunt, who was seeking to adopt Samuel, had been coerced into accepting adoption by the Department. He had not subpoenaed the paternal aunt to attend the hearing, and the dependency court denied father's request for a continuance to do so. Father failed to prove any exception to termination of parental rights, and his parental rights were therefore terminated.

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<sup>1</sup> All further statutory references are to the Welfare & Institutions Code, unless otherwise indicated.

Father appeals. He contends the dependency court erred in denying his request for pro per privileges in jail. We conclude the contention is waived by his failure to appeal. Father contends the court erred in denying his request for a continuance. We conclude the court did not abuse its discretion. Finally, father contends he was deprived of substantive due process by a system that terminated his parental rights because he was incarcerated. We conclude his parental rights were legitimately terminated due to father's drug use and failure to reunify; there was no constitutional error. We affirm.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

Samuel was born to Lanette B. ("mother") in October 2001. Due to mother's cocaine use, Samuel was born premature and suffered symptoms of drug withdrawal. He had numerous physical problems and developmental delays. Mother agreed to voluntary family maintenance and Samuel was discharged into her care. Mother failed to attend her drug program and tested positive for drug use.<sup>2</sup> She also failed to keep necessary medical appointments for Samuel, which caused Samuel to suffer a respiratory virus which could have been avoided by timely immunization. The Department detained Samuel, and filed a petition to declare him dependent due to mother's drug use. He was four months old.

Father had been in jail at the time of Samuel's birth, and was not involved in Samuel's parenting during the first four months of his life. When father was released from custody, the Department filed an amended petition seeking to declare Samuel dependent based on father's history of drug use.

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<sup>2</sup> Mother would go on to fail out of numerous drug programs. She failed to reunify with Samuel, and does not appeal.

Father entered a plea of no contest to the amended petition, and it was sustained. Father indicated he did not want custody of Samuel as he felt unable to cope with Samuel's medical needs. Father was granted reunification services. He was to attend parent education and Narcotics Anonymous, and perform random drug testing. If he had any positive test result, or missed a test without a legitimate reason, he was required to participate in a drug treatment program. He was granted monitored visitation.

During the next six months, father missed five drug tests. He claimed he missed one because he forgot, and the other four because he had a "bad attitude" and declined to test during a period when there were difficulties with his visitation.<sup>3</sup> Although father's first missed test was in May 2002, he did not enroll in a drug treatment program until September, a few weeks before the six-month review hearing.

At the hearing, father indicated a desire to represent himself. His motion was granted and his counsel discharged. After a contested hearing, the dependency court granted an additional six months of services. Father asked that Samuel be placed with the paternal aunt, Rhonda N. ("paternal aunt"). The dependency court agreed paternal aunt could be trained to care for Samuel's special needs, and gave the Department discretion to place Samuel with her.

On October 14, 2002, just one week after the hearing, father was arrested for armed robbery, and convicted. Two weeks later, Samuel was placed with paternal aunt. Paternal aunt was interested in becoming Samuel's guardian.

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<sup>3</sup> There may have been some problems arranging parents' visitation. Nonetheless, mother's visitation was more regular than father's.

On November 7, 2002, father filed a motion for pro per privileges, under Los Angeles Superior Court Rules, rule 6.41. On November 18, 2002, the dependency court denied the motion, reasoning that Rule 6.41 applied to criminal defendants, not parents in dependency proceedings. Father did not appeal the ruling.<sup>4</sup>

On April 7, 2003, the dependency court set the case for a contested review hearing. The court ordered the Department to determine the services available to father in prison, and get him enrolled in whatever available programs were consistent with the case plan.

The contested twelve-month review hearing was held on June 18, 2003. Father argued that he had complied with the reunification plan as much as possible, given his incarceration. The dependency court explained to father that his compliance with the plan was not at issue. Given that father would not be released from prison for some time,<sup>5</sup> there was no reasonable likelihood Samuel could be returned to him within six months. Thus, father's compliance with the case plan was not relevant. In order to foreclose father's further argument on this point, the Department stipulated that father was in compliance with the case plan as much as possible. The court therefore found

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<sup>4</sup> In April 2003, he filed with the dependency court an "objection for appellate review," arguing the denial of his motion violated his constitutional rights.

<sup>5</sup> Father's release date was a matter of dispute. His prison counselor indicated a fifteen year term. Father represented his release would be somewhat sooner, but conceded it was not likely he would be released within a year.

father in compliance,<sup>6</sup> but terminated his reunification services, as returning Samuel to father's custody within the next six months was not possible. (See § 366.21, subd. (g)(1).) The court set the case for a section 366.26 hearing on September 17, 2003.

Father filed a notice of intention to file a writ petition challenging the dependency court's ruling. However, he did not file a writ petition and the decision therefore became final. (No. B168357.)

In the social worker's September 15, 2003 report, it was reported that paternal aunt was now interested in adopting Samuel. The section 366.26 hearing was not held because father was not properly noticed. The hearing was continued to January 14, 2004.

On January 14, 2004, the dependency court indicated it could not go forward with the section 366.26 hearing because a home study had not yet been completed on paternal aunt's home. The hearing was continued to May 12, 2004. A non-appearance date was set for April 30, 2004, to make certain Department served its most recent report on father. At father's request, he was ordered back to prison forthwith.

Father was not immediately returned to prison; instead, he remained in county jail. On February 19, 2004, he wrote an "emergency" letter to Department's counsel, asking

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<sup>6</sup> On appeal, father emphasizes that he was found in compliance with the case plan. While this is technically true, we cannot help but note it is an empty finding. Father represented he was not provided any programs with which to comply for the bulk of this period. Father did not seek writ review of the decision to terminate his reunification services, so the propriety of the dependency court's finding that the Department made reasonable efforts to reunify is not before us.

Department's counsel to move for father to be returned to prison immediately or placed in the pro per module at jail.<sup>7</sup>

On April 30, 2004, the Department submitted its report to the dependency court. Department's counsel also provided the court (and all counsel) with copies of father's letter. The court denied father's motion, ruling it lacked jurisdiction over the conditions of father's confinement. Father did not timely appeal this ruling.

The section 366.26 hearing set for May 12, 2004 did not go forward as the home study still had not been prepared. The section 366.26 hearing was again continued to July 8, 2004. Father stated that he was still being held at county jail and challenged the dependency court's denial of his request for pro per privileges. The dependency court again indicated its ruling that the court could not grant father library privileges at county jail. At father's request, the court again ordered father returned to prison forthwith, but acknowledged that this order had not been carried out the last time it was made.

The section 366.26 hearing was finally held on July 8, 2004. Father had filed a preemptory challenge to the referee. The challenge was denied as untimely. Father became enraged at the denial of his motion<sup>8</sup> and had to be subdued by the bailiff. The hearing was trailed.

At the continued hearing a few days later, father attempted to present the argument that paternal aunt had been coerced into adoption. The social worker's report indicated

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<sup>7</sup> Father's letter also sought an order for a vegetarian diet in jail.

<sup>8</sup> Father called the dependency court "a little punk bitch."

that, some months earlier, father had told paternal aunt not to proceed with adoption. Paternal aunt had responded that if she did not adopt Samuel, a stranger would.<sup>9</sup> Father wanted to question paternal aunt at the hearing in order to prove that paternal aunt did not truly want to adopt Samuel, but was only indicating an intent to do so in order to prevent Samuel from being adopted by a stranger. Paternal aunt was not present at the hearing. Father had not subpoenaed paternal aunt; he said he could not do so because he was not housed in the pro per section of the county jail. Father asked for a continuance “so I can confront the caretaker.” The request was denied.

The court issued its ruling terminating father’s parental rights. Father filed a timely notice of appeal on August 13, 2004.

### ***CONTENTIONS OF THE PARTIES***

Father challenges the termination of his parental rights on three grounds. First, he contends the dependency court erred in denying him pro per privileges. Second, he contends the dependency court erred in denying his continuance to obtain the presence of paternal aunt. Finally, he contends the termination of his parental rights violated his constitutional rights, as he was in compliance with the case plan and lost his child only because he was incarcerated. The Department responds that father’s challenge to the denial of his request for pro per privileges is untimely; the court did not abuse its discretion in denying his request for a continuance; and there was no constitutional violation.

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<sup>9</sup> Father had attempted to convince paternal aunt that this was not the case and that the Department would keep Samuel in the system “as long as it takes.”



1. *Father Failed to Timely Appeal Denial of Pro Per Privileges*

Father's initial motion for pro per privileges was denied on November 18, 2002. As this order was an order following the disposition hearing, it was immediately appealable as a post-judgment order. (§ 395.) As father did not timely appeal from the order, he may not challenge it in an appeal from a subsequent order. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 590-591.)

Father suggests that the denial of his reassertion of the motion in April 2004 is reviewable on his appeal from the order terminating his parental rights, as the denial was part of the section 366.26 hearing which was continued over a matter of months. We disagree. In some cases, dependency courts hold two-phase section 366.26 hearings, finding the child adoptable in the first phase, but not terminating parental rights until the second. There is a dispute over whether the findings made in the first phase are immediately appealable. (Compare *In re Cody C.* (2004) 121 Cal.App.4th 1297, 1301 [holding such preliminary findings are necessarily interlocutory, as they may be made moot by the court's ultimate ruling] with *In re Edward H.*, *supra*, 43 Cal.App.4th at p. 591 [holding a court's identification of adoption as the permanent plan immediately appealable].) Yet the rationale by which preliminary findings at a section 366.26 hearing are considered not immediately appealable does not apply to simultaneous orders that were "not part and parcel of the order terminating parental rights." (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1251 [termination of visitation, denial of substitution of counsel, and denial of continuance are all not part of the order terminating parental rights].) In this case, the denial of father's reassertion of his motion for pro per status

was not part and parcel of the order terminating his parental rights. It was not a preliminary finding made pursuant to section 366.26. It was not an interlocutory ruling that might have been mooted by the court's resolution of the section 366.26 hearing. It was a separate ruling on a separate motion<sup>10</sup> and it was immediately appealable. Father's failure to timely appeal the order precludes him from challenging it on appeal.

2. *The Denial of a Continuance was Not an Abuse of Discretion*

Father next contends the dependency court erred in denying his request for a continuance to obtain paternal aunt's testimony at the section 366.26 hearing.

A continuance is to be granted in a dependency case only for good cause. (§ 352, subd. (a).) "Continuances are discouraged [citation] and we reverse an order denying a continuance only on a showing of an abuse of discretion." (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

At the hearing, evidence was introduced that paternal aunt had told father she sought to adopt Samuel because if she did not adopt him, a stranger would. On appeal, father argues that, had he been granted a continuance to obtain paternal aunt's testimony, he would have introduced sufficient evidence to prove paternal aunt had been coerced into seeking adoption. Father argues that these facts would have supported the exception to termination of parental rights existing when a relative does not wish to adopt but is willing to be the child's legal guardian. (§ 366.26, subd. (c)(1)(D).)

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<sup>10</sup> We note that the dependency court denied father's motion on April 30, 2004, a date which had been set for receipt of a report, and was not part of the continued section 366.26 hearing.

Section 366.26, subdivision (c)(1)(D) provides an exception to termination of parental rights when “[t]he child is living with a relative or foster parent who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her relative or foster parent would be detrimental to the emotional well-being of the child.” This exception is not established when a child’s relative prefers legal guardianship to adoption but chooses to adopt because the Department has led the relative to believe that the child will be adopted by another family if the relative does not adopt. (*In re Rachel M.* (2004) 113 Cal.App.4th 1289, 1294, 1298.)

Thus, the anticipated testimony father sought to obtain from paternal aunt would not have established an exception to the termination of parental rights. As father sought a continuance to obtain testimony that would not have had an effect on the ultimate result of the hearing, the dependency court did not abuse its discretion in denying a continuance.

3. *Father’s Constitutional Rights Were Not Violated by the Termination of His Parental Rights*

Finally, father argues his constitutional rights were violated in that his parental rights to Samuel were terminated solely because he was incarcerated. Father’s argument is a thinly-veiled attempt to bring an untimely challenge to the termination of his reunification services.

The procedure used by California for termination of parental rights is constitutional. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.) “By the time dependency proceedings have reached the stage of a section 366.26 hearing, there have been multiple specific findings of parental unfitness. Except for a temporary period, the grounds for initial removal of the child from parental custody have been established under a clear and convincing standard [citation]; in addition, there have been a series of hearings involving ongoing reunification efforts and, at each hearing, there was a statutory presumption that the child should be returned to the custody of the parent. [Citations.] Only if, over this entire period of time, the state continually has established that a return of custody to the parent would be detrimental to the child is the section 366.26 stage even reached.” (*Id.*, at p. 253.) “By the time termination is possible under our dependency statutes the danger to the child from parental unfitness is so well established that there is no longer ‘reason to believe that positive nurturing parent-child relations exist’ [citation], and the *parens patriae* interest of the state favoring preservation rather than severance of natural familial bonds has been extinguished.” (*Id.*, at p. 256.)

Father argues *Cynthia D.* is distinguishable as the necessary preliminary findings of parental unfitness were not made. Father argues, “[r]eunification services were terminated only because the father was incarcerated.” Yet the propriety of the termination of reunification services is not before us. Nor is the propriety of the finding that Samuel could not be returned to father at the close of the initial six-month period of reunification services. Nor is the propriety of the original finding of dependency, which

was based on father's drug use, not his incarceration. All of these findings form the basis for the subsequent termination of parental rights, and none of these findings are subject to appellate review at this time.

We note that California law does not provide for the termination of parental rights solely based on a parent's incarceration. Indeed, if there are no other grounds for dependency, a child cannot be declared dependent based on the parent's incarceration if the parent has otherwise arranged for the care of the child. (§ 300, subd. (g); *In re S.D.* (2002) 99 Cal.App.4th 1068, 1071.) Additionally, incarcerated parents are entitled to reasonable reunification services. (*In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1406-1407.) Moreover, incarcerated parents, like all other parents, can prevent the termination of parental rights if they have established a parent-child relationship such that the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(A).) In contrast, Samuel was declared dependent based on father's drug use; father never challenged the finding he was awarded reasonable reunification services; and father did not establish the existence of a parent-child relationship sufficient to prevent termination of parental rights. It is for these reasons, not father's incarceration, that his parental rights were terminated.

### ***DISPOSITION***

The judgment is affirmed.

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CROSKEY, J.

We Concur:

KLEIN, P.J.

KITCHING, J.